

1. Did the ALJ err in reinstating TTD when there was evidence of an intervening injury? Respondent argues that claimant misrepresented his prior medical and injury

history, while under oath, regarding multiple prior and subsequent non-work-related accidents and injuries. Respondent contends that the Board's jurisdiction comes from the "certain defenses" section of K.S.A. 44-534a. Claimant argues that a report from a subsequent examination by board certified neurosurgeon Geoffrey L. Blatt, M.D., dated July 16, 2010, should be excluded from the record as Dr. Blatt had been provided a multitude of information regarding claimant's past injuries and possible intervening injuries, all with potential monetary settlements. Claimant argues that Dr. Blatt's independent evaluation and opinion was clouded.

2. Does the Board have jurisdiction over this dispute at this time? Respondent argues that the "certain defense" section of K.S.A. 44-534a allows jurisdiction in this matter. Claimant argues that this dispute is from a preliminary hearing and the limits of K.S.A. 44-534a and K.S.A. 2010 Supp. 44-551 preclude Board review at this time.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision dealing with the ALJ's referral of claimant for an IME should remain in full force and effect and the appeal by respondent on that issue should be dismissed as the Board has no jurisdiction over that issue. The order granting claimant ongoing TTD is reversed as claimant has failed to prove that the need for TTD stems from his work-related accident. Instead, the record supports a finding that claimant's need for TTD stems from an intervening accident or accidents not related to his job with respondent.

Claimant began working as a maintenance man for respondent in May 2009. On July 27, 2009, while retrieving vertical blinds from the shop, claimant tripped as he was backing up. A cord caught his foot and he fell backwards. Claimant fell, hitting his right side, injuring his right side and his back. Claimant testified that the blinds also hit him in the groin, injuring his left testicle. Claimant was treated at the emergency room at Shawnee Mission Medical Center, with x-rays being taken, a urological examination conducted and a neurological evaluation recommended. Ultrasound examinations of claimant's testicles and an MRI of his back were conducted. Urologist reports from July 2009 indicated claimant's testicles were not swollen, but were slightly tender. The left hip displayed mild hip osteoarthritis. The MRI of the lumbar spine indicated a small left disc protrusion at L2-3 with mild central stenosis.

A K-WC E-1, Application for Hearing, was filed on August 5, 2009, with the Kansas State Workers Compensation Division, alleging injury to claimant's back and groin. The matter apparently went to preliminary hearing¹ and a Preliminary Decision was issued on September 18, 2009, referring claimant to Terrence Pratt, M.D. Dr. Pratt first examined

¹ No transcript from this hearing is in the file.

claimant on October 19, 2009. At that time, claimant complained of low back pain radiating to his heel and left testicular pain. Claimant's history to Dr. Pratt indicated prior low back pain with numbness in the left leg shooting into claimant's groin. This involvement occurred in April 2008 while claimant was under the care of Dr. Pang. After discussing claimant's history, Dr. Pratt reported that he did not consider any of claimant's current symptoms as new. A urology reassessment was recommended. Claimant was not working at the time.

Claimant returned to Dr. Pratt on December 3, 2009. Claimant reported that he had been seen by a Dr. Hill² who prescribed Vicodin, with claimant taking 4 to 5 per day. Claimant discussed severe discomfort and an inability to get out of bed. Claimant's low back pain radiated to the medial thigh on the left. Claimant's urology report indicated a small hydrocele which should not cause scrotal pain, with the hydrocele on the right and claimant's pain being on the left. No genitourinary pathology was found as the source of claimant's pain. Dr. Pratt was unable to explain all of claimant's symptoms, and inappropriate responses on the examination were indicated. Claimant was restricted from lifting in excess of 20 pounds and was not to perform frequent bending or twisting.

Claimant returned to Dr. Pratt on December 22, 2009. At that time, claimant displayed right low back pain with radiating pain into the right lower extremity. He indicated testicular and groin discomfort, described by Dr. Pratt as of undetermined etiology. Claimant remained on Vicodin. Claimant again returned to Dr. Pratt on January 14, 2010. Claimant's symptoms remained. A surgical evaluation was recommended. Epidural injections were discussed, but claimant had no interest due to a fear of steroids.

Claimant was referred by respondent to spine surgeon David K. Ebelke, M.D., on February 22, 2010. Claimant reported low back pain with pain radiating into the left lower extremity. Claimant denied prior low back problems. However, records indicated claimant had seen Dr. Pang for an injury in April of 2008. Claimant was using a TENS unit at the time of the examination with Dr. Ebelke. On examination, claimant displayed tenderness to the touch in his low back without spasm. The range of motion effort was described as poor. Neurological examination indicated full motor strength in the lower extremities although with hesitance. Knee and ankle reflexes were symmetrical, and Babinski sign was normal. No atrophy was displayed at the thigh and calf level. The thoracic MRI from August 10, 2009, was read as essentially normal, with the lumbar MRI showing loss of disc signal intensity at L2-3 and L3-4 with a bulge at L2-3 without herniation. At L2-3, there was a minimal left-sided bulge with mild stenosis of the central sac. X-rays indicated mild loss of disc height at L2-3 with anterior osteophytes. Bullet fragments were seen in the left hemipelvis area. Dr. Ebelke diagnosed only a minor lumbar strain/contusion from the work accident. Discontinuation of the narcotic medication

² P.H. Trans. (May 13, 2010), Cl. Ex. 2 (Dr. Pratt's Dec. 3, 2009 report.)

was recommended. Claimant's behavior indicated possible malingering and there were no surgical indications. Claimant had suffered no permanent injuries and needed no permanent restrictions. The work incident was described as trivial. Based on the report of Dr. Ebelke, Dr. Pratt determined on March 18, 2010, that claimant needed no reevaluation.

Claimant was referred by his attorney to board certified neurosurgeon Gregory E. Walker, M.D., on March 8, 2010. Claimant presented to Dr. Walker with numbness in the medial aspect of his left thigh into the inguinal region, low back pain at 8 on a scale of 1 to 10, and left lower extremity pain into his heel. His past history included only an appendectomy and an accident in 2002 when he hit his head and upper shoulder. Dr. Walker had the opportunity to review the MRI of the lumbar spine, which displayed, in his opinion, a herniated nucleus pulposus at L2-3 on the left side. Claimant displayed marked weakness in the left lower extremity quadriceps and was unable to bear weight or try to perform a mild knee bend with all the weight on his left lower extremity. Claimant displayed diminished sensation in the L2-3 distribution on the left side. Dr. Walker diagnosed the disk herniation at L2-3 with ongoing radicular symptoms from the accident on July 27, 2009. A surgical consultation was recommended with either a neurosurgeon or spine surgeon from the orthopedic realm.

Based in part on the report of Dr. Ebelke, respondent halted claimant's TTD on March 18, 2010. The matter went to preliminary hearing on May 13, 2010, from which an order³ was issued mandating that respondent restart TTD effective May 13, 2010, and that claimant be referred to Doug C. Burton, M.D., at the University of Kansas Medical Center for an evaluation and, if necessary, treatment. However, Dr. Burton refused to see claimant, and the ALJ issued an Amended Preliminary Decision on May 20, 2010, ordering the evaluation to be conducted by the agreed physician John M. Ciccarelli, M.D., at Premier Spine Care. Unfortunately, Dr. Ciccarelli also refused to examine claimant. The parties then agreed that claimant was to be examined and, if necessary, treated by board certified neurosurgeon Geoffrey L. Blatt, M.D. However, the parties failed to advise the ALJ of the change of physician prior to the Motion Hearing held January 13, 2011. Additionally, respondent again stopped TTD effective August 12, 2010. The medical report of Dr. Blatt from the July 16, 2010, examination was admitted without objection at the January 13, 2011, hearing. However, the ALJ, at the hearing, made it clear that Dr. Blatt was not the court's choice and his report would not be admitted as the normal court-ordered independent medical examiner's report normally was. Even after the parties agreed to admit the report without objection, the court ordered an IME with Mark Bernhardt, M.D., of the Dickson-Diveley Midwest Orthopaedic Clinic.

³ Preliminary Decision dated March 13, 2010.

Respondent objected to the order allowing claimant to restart TTD effective August 13, 2010, until receipt of Dr. Bernhardt's order addressing claimant's work status. Respondent appealed the Preliminary Decision, arguing that the ALJ committed prejudicial error by reinstating TTD when there was clear evidence of an intervening injury. The record had been supplemented with numerous examples of claimant's prior work-related injuries, settlements, non-work-related intervening injuries after his employment with respondent, and numerous monetary payments from various legal actions. Respondent further attacks claimant's credibility alleging that claimant misrepresented his past claims and post-accident intervening injuries during his testimony to the court. Claimant testified, on cross-examination during the preliminary hearing on May 13, 2010, that he had suffered falls at Church's Chicken on February 22, 2010, and again while at Wal-Mart on April 6, 2010. After both falls, claimant went to a local emergency room and was provided with medical treatment, although the extent of both is unknown. Additionally, claimant settled both the claim against Church's and the claim against Wal-Mart, each with a monetary settlement and his medical treatment being included in the settlements. Again, those amounts are unknown.

Principles of Law and Analysis

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

⁴ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2009 Supp. 44-501(a).

2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁷

The ALJ, in the Preliminary Decision of January 13, 2011, refused to accept the agreed-upon evaluation of Dr. Blatt as a court appointed neutral physician. This is because the parties, while agreeing on the evaluation, failed to advise the ALJ or seek permission to refer claimant to the doctor. The ALJ then appointed Dr. Bernhardt to perform an IME of claimant, and ordered ongoing TTD while the IME is being accomplished.

The initial issue for the Board's consideration is whether the Board has the statutory authority to address the issues being raised at this point in this litigation. The answer to the referral for an IME is no. The Board is not empowered to address the issue of an IME ordered by an administrative law judge at a preliminary hearing. Respondent's recourse in this matter will come at the time of the regular hearing. The issues regarding claimant's credibility and the weight that will be given to medical opinions based on claimant's provided information will be addressed at that time. Until that time, the Board is without jurisdiction to answer respondent's objection to the IME referral. Therefore, the January 13, 2011, Preliminary Decision of the ALJ remains in full force and effect regarding the referral for an IME, and the appeal of respondent on that issue is dismissed.

The Board normally would not have the statutory power to address the order of TTD from a preliminary hearing. However, under these circumstances, this Board Member considers the conflict to be more one of whether claimant's temporary condition relates to the original injury with respondent, or whether an intervening accident or accidents and resulting injuries are the blame. Claimant's conflicting and, at times, evasive testimony raises serious questions not only about his credibility, but also about the ongoing need for TTD. While an entitlement to TTD is not normally a reviewable issue on an appeal from a preliminary hearing, when the issue involves an intervening injury, the question becomes one of whether the injury resulting in a claimant's need for TTD arose out of and in the course of the claimant's employment. This issue is reviewable by the Board on an appeal from a preliminary hearing.

- (2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any

⁷ K.S.A. 44-534a(a)(2).

type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.⁸

This Board Member finds that claimant has failed to satisfy his burden that he is completely and temporarily incapable of engaging in any type of substantial and gainful employment as the result of an injury while working for respondent. An award of ongoing TTD in this instance is inappropriate. The Order of the ALJ on this issue is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Board does not have the jurisdiction to consider the issue raised by respondent dealing with the referral for an IME at this time. Therefore, the appeal of respondent from the January 13, 2011, Preliminary Decision of the ALJ on that issue is dismissed. The portion of the Order granting claimant ongoing TTD is reversed as claimant has failed to prove that the need for TTD stems from the accident and resulting injuries suffered while working for respondent. The Preliminary Decision remains in full force and effect on the issue of the IME referral, but is reversed with regard to the award of TTD.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated January 13, 2011, remains in full force and effect on the issue of the IME referral, and the appeal of respondent shall be, and is hereby, dismissed on that issue. The Preliminary Decision of the ALJ is reversed with regard to the award of TTD.

IT IS SO ORDERED.

⁸ K.S.A. 44-510c(b)(2).

⁹ K.S.A. 44-534a.

Dated this ____ day of April, 2011.

HONORABLE GARY M. KORTE

c: Mark E. Kolich, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge